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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

LELORD KORDEL and ALFRED FELDTEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General on behalf of the United States petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 20, 1969.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1968, and was modified on petition for

rehearing on February 20, 1969. On March 12, 1969, Mr. Justice Stewart extended the government's time for filing a petition for a writ of certiorari to and including April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for violation of the food and drugs laws, respondents' privilege against self-incrimination was violated by the fact that the government, in a prior civil proceeding to condemn the drugs owned by the corporation of which respondents were officers, had directed interrogatories to the corporation pursuant to Rule 33, F.R. Civ. P., with respect to respondents' activities in connection with the drugs.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, respondents and their corporate employer, Detroit Vital Foods, Inc., were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs (Frutex wafers, Lecigan granules, Aminex and Nutri-Time tablets) and with performing acts which resulted in the misbranding of the drug Korleen while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331(a), (k)). Respondent Kordel was sentenced to two years' imprisonment and a fine of $10,000; respondent Feldten was sentenced to imprison-

ment for one year, suspended to thirty days with three years' probation, and was fined $2000; the corporation was fined $10,000.[1]

Detroit Vital Foods, Inc., is a Michigan corporation with its headquarters in Detroit. Respondent Kordel was its president and respondent Feldten its treasurer (250b-252b).[2] Kordel was the author of numerous books and leaflets promoting the products of Detroit Vital Foods, Inc. As the court of appeals found, the evidence showed that during the years 1959-1961 Kordel traveled across the country delivering lectures in various cities which were advertised and open to the public. The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the respondents (App., *infra*, p. 17). The company's products were sold at booths established in or near the lecture halls and were also available in health food stores generally. Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit (App., *infra*, p. 17). The essence of the criminal charges against respondents was that, as to

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[1] Respondent Feldten and Detroit Vital Foods, Inc., were found guilty of misdemeanors as first offenders. Respondent Kordel was found guilty of felonies by virtue of his prior conviction for violation of Section 331. See, affirming the previous conviction, *Kordel* v. *United States*, 335 U.S. 345; see, also, 21 U.S.C. 333.

[2] See n. 3, *infra*.

some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained false and misleading statements. In addition, the indictment alleged, as to all counts on which respondents were convicted,[3] that the products (claimed by defendants to be merely food supplements) were in fact drugs intended by defendants to be used for the prevention and treatment of various diseases and conditions (see App., *infra*, pp. 17-18) and that the labeling for them was deficient under 21 U.S.C. 352(f) in that it failed to set forth adequate directions for use (*e.g.*, the dosage, frequency and duration of administration of each drug).[4] The government proved Kordel's representations about the drugs by introducing tape recordings of Kordel's public lectures.

The indictment in this case was returned in August 1963. On June 9, 1960, the government had filed a libel under 21 U.S.C. 334 seeking to condemn quantities of the products Korleen tablets and Frutex, on the ground that they had been misbranded while held for sale after shipment in interstate commerce. The

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[3] Respondents were convicted on counts 4, 8, 9, 10, and 11 of the indictment, which are set forth at pages 13a-17a and 26a-39a of defendants' appendix in the court below. We are causing a copy of that appendix to be filed as part of the record with the Clerk of this Court as well as the appendix for the government (citations to the former are denoted by the letter (a), and to the latter by the letter (b), following the page reference), both of which contain pertinent excerpts from the proceedings at trial.

[4] An example of an almost identical prosecution is *Nature Food Centres, Inc.* v. *United States*, 310 F.2d 67 (C.A. 1), certiorari denied, 371 U.S. 968.

corporate defendant, Detroit Vital Foods, Inc., filed a claim and answer denying the material allegations of the libel. During the course of the civil suit, which terminated favorably to the government (see *United States* v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78 (C.A. 6), certiorari denied, 379 U.S. 832),[5] the government served interrogatories upon the claimant pursuant to Rule 33, F.R. Civ. P.[6] The interrogatories were filed on January 9, 1961, and sought detailed information about the corporate defendant and Kordel's activities with relation to oral representations about the products Frutex and Korleen tablets made during the lecture series at Detroit between March 29, and April 8, 1960.[7] In April 1961 Detroit Vital Foods, Inc., moved to stay the libel action on the ground that criminal prosecution was being considered by the government. The motion recited that in late January 1961, shortly after service of the interrogatories by the government, the company had received a notice of hearing under 21 U.S.C. 335,[8] indicating that crim-

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[5] See, also, *United States* v. *39 Cases * * * Mich. Brand Korleen Tablets*, 192 F. Supp. 51 (E.D. Mich.).

[6] The interrogatories and the answers thereto are set forth in defendants' supplemental appendix in the court below, a copy of which is being filed as part of the record with the Clerk of this Court.

[7] Count 4 of the instant indictment, on which respondents were convicted, was based on this lecture-promotion. The other counts were based on lecture-promotions of March 7-17, 1960, given at New York, and April 4-14, 1961, given at Detroit.

[8] 21 U.S.C. 335 provides that "Before any violation of this chapter is reported by the Secretary to any United States

inal prosecution of the corporation and respondents was contemplated, in part for the same conduct which was the subject of the libel. The motion asked that the claimant's time to respond to the government's interrogatories be extended until after final disposition of the criminal case pursuant to the court's discretionary power,[9] since answering the interrogatories would disclose the basis of the claimant's defense in the criminal case. On June 30, 1961, the district court denied the motion for a stay, on the ground that there was no certainty when or whether a criminal prosecution would be brought and that the corporation was not prejudiced by being required to answer the interrogatories, since the government could in any event obtain information pertinent to a criminal case from the trial of the libel action itself.[10] The court ordered claimant to answer the interrogatories or file objections within twenty days. Answers to the interrogatories were subsequently filed by the respondent Feldten for Detroit Vital Foods, Inc. Feldten subscribed to the answers as vice president of the claimant and stated that the answers were true to the best of his knowledge and belief but that not all of the answers

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attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding."

[9] Reliance on the Fifth Amendment privilege against self-incrimination was expressly eschewed.

[10] We are lodging with the Clerk of this Court a copy of the district court's decision denying claimant's motion to stay the libel proceeding.

were known to him personally. Objections to certain of the interrogatories were submitted by claimant and overruled before the answers were in fact furnished. At no time did claimant or either respondent lodge an objection to any question on Fifth Amendment grounds.

The matter was referred to the Attorney General with a recommendation for prosecution on June 13, 1962, and an indictment was returned on August 5, 1963. On March 22, 1965, respondents and Detroit Vital Foods, Inc., moved to suppress "any evidence or leads obtained therefrom by the Federal Government in compulsory discovery proceedings instituted by the Government" in the libel action (55a). They contended that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority, and is violative of civilized standards of procedures in the administration of criminal justice" *(ibid.)*. In the alternative the motion requested a hearing to determine the government's good faith and motive in commencing the civil action and serving the interrogatories. The court denied the motion to suppress but granted the request for a hearing. After a three-day hearing (see 1b-66b), the district court found that at the time the civil case was filed, the attorney for the Department of Health, Education and Welfare had evidence to establish all of the elements of the criminal offenses, and that the purpose of the interrogatories was to narrow the issues and to lay a foundation for a motion for summary judgment. The court determined that the government did

not act in bad faith in starting the civil suit or in filing the interrogatories, and that there was then no certainty that a criminal prosecution would be brought (103a-106a).

On July 26, 1968, the court of appeals for the Sixth Circuit reversed the convictions of all defendants on the ground that they had been denied the protection afforded by the Fifth Amendment. The government filed a petition for rehearing which was granted. On February 20, 1969, the court of appeals modified its written opinion so as to affirm the conviction of the corporate defendant, but adhered to its judgment reversing the convictions of respondents Kordel and Feldten.

Although the interrogatories had not been introduced into evidence in the criminal case, the court of appeals found that the government had not proved that information and leads obtained thereby had not been utilized in securing the indictment or obtaining evidence admitted at the trial (See App., *infra*, pp. 19-20, 24-26). The court held that the good faith of the government in using the interrogatories was irrelevant, since, by requiring the corporation to answer the interrogatories, the government had compelled the individual respondents to incriminate themselves. The court purported to recognize that the privilege against self-incrimination is available only to natural persons and not to a corporation. It held, nevertheless, that the Fifth Amendment privilege was available to both Feldten and Kordel even though neither had interposed any claim to the seized drugs, neither was a

party to the civil action, and Kordel had supplied no answers to the interrogatories.[11]

REASONS FOR GRANTING THE WRIT

The decision below holds that, because the government brought a civil suit to remove misbranded drugs from circulation, and in the course thereof adopted normal procedures of using interrogatories to narrow the issues, individual officers of the corporate owner of the drugs obtained, in effect, immunity from prosecution for their individual misdeeds. In holding that interrogatories addressed to a corporation violated the Fifth Amendment privilege of the individual respondents, the court of appeals has decided an important question in a manner contrary to the decisions of this Court and of other courts of appeals. As the court below noted, "it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings" (App., *infra*, p. 25). While the quoted statement was made specifically with reference to the enforcement of the Federal Food, Drug and Cosmetic Act, it is likewise applicable—and the decision thus has similar impact—in the areas of antitrust, internal revenue, and securities regulation (among others), where federal agencies are vested with the responsibility of ad-

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[11] Although the answers to the interrogatories were not introduced in evidence at the trial, the court of appeals also held that Feldten's answers to the interrogatories, which it characterized as "admissions" (App., *infra*, p. 26), were not admissible against Kordel under the rule of *Bruton* v. *United States*, 391 U.S. 123.

ministering statutes providing both civil and criminal remedies against offending corporations and/or individuals. The problem created by the court's ruling is particularly acute in the food and drug field because of the obvious need for the government to act quickly in bringing civil condemnation proceedings in order to protect the public by removing misbranded or adulterated drugs from circulation in situations in which further investigation is appropriate before it is decided whether or not to institute criminal proceedings. In the course of such civil proceedings it is not uncommon for the government to use interrogatories or other forms of discovery designed to simplify the issues and thereby expedite the court action. It is precisely such good faith use of civil discovery techniques, directed to the corporate claimant, which has been held by the court below to violate respondents' privilege against self-incrimination.

This holding is in conflict with decisions of other federal courts of appeals and several district courts as to the critical question whether submission of the interrogatories to the corporation "compelled" the individual respondents to incriminate themselves, or suffer forfeiture of their property. See *United States* v. *3963 Bottles* * * * *Enerjol*, 265 F. 2d 332, 335-336 (C.A. 7), certiorari denied, 360 U.S. 931; *United States* v. *42 Jars* * * * *Bee Royale Capsules*, 264 F. 2d 666, 670 (C.A. 3); *United States* v. *48 Jars* * * *, 23 F.R.D. 192, 193-196 (D.D.C.); *United States* v. *Article of Drug*, 43 F.R.D. 181, 186-187 (D. Del.); see, also, *United States* v. *Parrott*, S.D.N.Y., No. 66 Cr. 243, decided February 14, 1969; cf. *United States* v.

Blue, 384 U.S. 251; *United States* v. *Light*, 394 F. 2d 908 (C.A. 2). As the *Enerjol* and *Bee Royale* cases make clear, there is no requirement under Rule 33, F.R. Civ. P., that the person answering interrogatories on behalf of a corporation have personal knowledge of the truth of the answers furnished. Nor is there any requirement that the interrogatories be answered by an officer or agent of the corporation who might incriminate himself by doing so. The submission of interrogatories to the corporation merely imposes a duty *on the corporation* to "appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *Enerjol, supra*, 265 F. 2d at 336. Respondents here have never attempted to make a showing that no officer or employee of the corporation was available to answer the interrogatories without risk of self-incrimination. And even if such were the case, the corporation would be obligated to designate another agent, such as its attorney, to answer the interrogatories. *United States* v. *48 Jars, supra*, 23 F.R.D. at 196; *United States* v. *Article of Drug, supra*, 43 F.R.D. at 187; compare the special situation in *Communist Party* v. *United States*, 331 F. 2d 807, 814 (C.A.D.C.), certiorari denied, 377 U.S. 968. Thus respondents were in no way "coerced" (App., *infra*, p. 26) into supplying answers to the interrogatories.

The situation here is manifestly different from that in *Boyd* v. *United States*, 116 U.S. 616, and *Garrity* v. *New Jersey*, 385 U.S. 493, relied on by the court below (App., *infra*, p. 21), where statutes were held to compel individuals to incriminate themselves by

giving them a "choice" between furnishing evidence or losing their property. In likening the present case to *Boyd* and *Garrity*, the court of appeals made the critical error of treating the property seized by the government as respondents' property, which would be liable to forfeiture if they did not answer the interrogatories (App., *infra*, p. 20). Respondents were not parties to the libel suit and claimed no personal interest in the property which was the subject of that action. The seized drugs were the property of the corporation. Whatever the relationship of respondent Kordel to the corporation, he could not utilize the benefits of the corporate form of doing business and still claim an individual, personal interest in the property. And, of course, the corporation had no privilege against self-incrimination and was incapable of asserting such a privilege on behalf of any individual officer or employee. *E.g.*, *Campbell Painting Co.* v. *Reid*, 392 U.S. 286; *United States* v. *White*, 322 U.S. 694; *Wilson* v. *United States*, 221 U.S. 361.

The court of appeals was apparently influenced by its belief that the interrogatories in the civil condemnation action were broader than was necessary for the purposes of the suit (see App., *infra*, p. 25). As we have indicated, even the submission of improper and overbroad interrogatories to the corporation would not have violated respondents' privilege against self-incrimination since they were under no compulsion to answer. Moreover, Rules 30(b) and 33, F.R. Civ. P., provide the method by which a party in a civil proceeding may be excused from answering improper or overbroad interrogatories. One who fails to pursue

this remedy and chooses, instead, to answer the interrogatories should not thereafter be heard to claim that the answers violated the privilege against self-incrimination.[12] Invocation of that privilege in a subsequent criminal prosecution should not be permitted to serve as a substitute for appeal from an adverse ruling on a motion to limit the scope of, or extend the time for answering, interrogatories in the civil proceedings.

In any event, the interrogatories at issue here did not seek information which was not directly pertinent to the civil case. The allegation in the libel was, in part, that the drugs were misbranded in violation of 21 U.S.C. 352(f) because of failure of the labeling to bear adequate directions for use *for the purposes for which the drugs were intended.* An oral statement can constitute proof of the intended use of a product. *E.g., Nature Food Centres, Inc.* v. *United States,* 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968; *United States* v. *Article of Drug * * * B-Complex Cholinos Capsules,* 362 F. 2d 923 (C.A. 3). The theory of the government's libel action was that products labeled as foods were being represented, in oral lectures, to be efficacious as drugs. While the government could have proved these oral representations at trial by means of tape recordings in its possession, it manifestly would have expedited the civil suit if

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[12] This Court has repeatedly held that the privilege against self-incrimination is not available to one who fails to invoke it in a timely and proper manner. See, *e.g., Marchetti* v. *United States,* 390 U.S. 39, 61; *Rogers* v. *United States,* 340 U.S. 367, 372-375; *United States* v. *Monia,* 317 U.S. 424, 427; *Brown* v. *Walker,* 161 U.S. 591, 597.

the government could establish the content of these representations by means of interrogatories and thus be in a position to move for summary judgment. It was therefore proper to determine whether the corporate claimant agreed that representations had been made by corporate representatives as to the disease-curing efficacy of the products. The interrogatories to the corporation were properly directed toward these ends and were thus pertinent to the issues in the civil suit. As the district judge found, the interrogatories were submitted in good faith, after notice to the corporation that criminal proceedings were being contemplated. See *Abel* v. *United States*, 362 U.S. 217.[13]

In sum, there is no basis either in the Fifth Amendment or in the law surrounding the proper use of interrogatories to support the holding of the court below, the net effect of which is to make it unwarrantedly hazardous for an agency of the government to utilize interrogatories in a civil action against a corporation believed to have violated the law, in the not uncommon situation where there is a possibility of criminal prosecution of individual officers thereof for their part in the illegal activity. We therefore

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[13] The court of appeals' alternative holding that submission of the interrogatories (which were answered for the corporation by Feldten) violated Kordel's right under *Bruton* v. *United States*, 391 U.S. 123 (App., *infra*, p. 26) is plainly erroneous. *Bruton* held that the admission into evidence in a joint trial of the confession of a co-defendant violated the defendant's Sixth Amendment right of confrontation. Here, as previously indicated, the answers to the interrogatories, which did not in any event constitute a confession by Feldten, were not admitted into evidence in the criminal prosecution.

urge this Court to review and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1969.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17639

Filed Feb. 20, 1969, Carl W. Reuss, Clerk

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DETROIT VITAL FOODS, INC., LELORD KORDEL, AND ALFRED FELDTEN, DEFENDANTS-APPELLANTS

Appeal from the United States District Court,
Eastern District of Michigan

Decided February 20, 1969

Before: O'SULLIVAN and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

COMBS, Circuit Judge. The defendants were found guilty by a jury on five counts of an indictment charging them with introduction into interstate commerce of misbranded drugs and with causing a drug to be misbranded after it had been shipped in interstate commerce. 21 U.S.C. § 331(a) and (k). The defendant Kordel was sentenced to two years imprisonment and to a fine of $10,000.00. The defendant Feldten was sentenced to one year imprisonment, suspended to thirty days with three years probation, and to a fine of $2,000.00. A total fine of $10,000.00 was imposed upon the corporate defendant.

Detroit Vital Foods, Inc., is a Michigan corporation with headquarters in Detroit. The defendants Kordel and Feldten were its president and vice president, respectively. During 1959, 1960, and 1961, Kordel traveled across the country delivering a series of lectures in different cities. Advertisement of the lectures preceded his appearance and the public was invited to attend. The meetings were held in public halls or auditoriums leased for the occasion by the defendants. Sales booths were established in or near the lecture halls where the audience could purchase the company's products Aminex, Frutex, Nutri-Time, Korleen, and other products not here in question, usually at special introductory prices. The company's products were sold not only at the lectures but were generally available in health food stores. Each package had a label attached which described the contents and gave directions for use.

Kordel was the author of numerous books and leaflets, such as "Eat and Grow Younger", "How to Make People Like You", "Health Through Nutrition", and "Is This a New Way to Strengthen Your Heart?"

The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products offered for sale by the defendants. Leaflets distributed to the lecture audiences were to the effect that the statements made were the personal opinion of the speaker and author and that a physician should be consulted in regard to specific diseases.

Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit.

Kordel in his lectures and published material advertised some products by name. In other instances,

he merely related certain chemicals or food elements to the improvement of various physical ailments and recommended the company's products as the best source. For example:

> A combination of chlorine, methionine, and inositol—exactly the ingredients of Korleen—is a successful treatment for cirrhosis of the liver.
>
> Varicose veins existing for twenty-five years were cured in three months with the intake of three Korleen tablets per day.
>
> People may "protect" their bodies from headaches, colds, stiff ankles, poor circulation, gas, constipation, and poor digestion by partaking of a concentrated source of seventy-two different vitamins, minerals, and nutrients—coincidentally, the product which contains all those ingredients is Nutri-Time.
>
> Vitamin C is a preventive and cure for bleeding gums, sore throat, earache, swollen neck glands, pneumonia, and acute rheumatism—the best source of Vitamin C is Frutex.
>
> Protein helps form antibodies to fight infection and is the first line of defense; it is most efficiently assimilated within the body when introduced in the form of a concentrated protein tablet—the recommended source is Super Protein Aminex which has a high concentrate of protein and all animal acids in the proper balance.

Kordel occasionally stated that his remarks had no relation to drugs, that he spoke only of natural nutrients used for food supplements.

Several grounds of assigned error were argued in briefs but we consider it necessary to discuss only one. We hold that the judgments must be reversed because defendants were compelled to give testimony against

themselves in violation of the Fifth Amendment to the United States Constitution.

While defendants were under investigation for possible criminal violation of the Food, Drug and Cosmetic Act, the Government instituted a civil action against Detroit Vital Foods, Inc., to condemn certain quantities of their products Korleen and Frutex, asserting that these articles were misbranded. In the civil action the defendants were served with extensive written interrogatories seeking comprehensive and detailed information about the corporate defendant and the activities of the individual defendants in connection with the company's business. Before these interrogatories were answered defendants were notified that the Government contemplated taking criminal action against them because of their activities in connection with Korleen and Frutex.

The defendants filed objections to being required to answer the interrogatories and moved to stay the civil proceedings pending outcome of the contemplated criminal action. The objections and motion were denied by the Honorable Theodore Levin, United States District Judge for the Eastern District of Michigan, who reasoned that the defendants would not necessarily be prejudiced since there was no certainty when, or if, a criminal action would be brought. The defendants then filed answers to the interrogatories pursuant to Judge Levin's order. Much of the information supplied by the defendants in answer to the interrogatories was necessary to the Government's case in the criminal prosecution.

Prior to the trial of this action, the defendants moved to quash the indictment and to suppress all evidence and leads obtained by the Government in the civil action. The trial judge, Honorable Ralph M. Freeman, granted a hearing on the motions and

thereafter denied them. It was developed at the hearing that the civil case and the investigation of the criminal case went forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation, and recommendation for criminal prosecution was not made until after Judge Levin had ordered the interrogatories to be answered in the civil case. The interrogatories were prepared by Mr. Randolph of the Food and Drug Administration in Washington, who made the initial decision to recommend criminal action against the defendants. The answers to the interrogatories were sent to Mr. Randolph and the indictment was prepared in Randolph's office.

In no sense was the action of the defendants in answering the interrogatories voluntary. When ordered to do so after their objections had been overruled, they had three possible courses available to them. They could still have refused to answer. This almost certainly would have resulted in the forfeiture of their property which had been seized by the Government. They could have given false answers to the interrogatories. This would have subjected them to possible prosecution for perjury. Their third course was to supply the required information, thereby possibly incriminating themselves in the contemplated criminal action. In choosing the third course defendants supplied the Government with evidence and leads helpful in securing their indictment and subsequent conviction. Their choice was a hard one and the specific question is whether they could be required to make a choice. We think not. A person may not be required to supply information which might possibly incriminate him upon penalty of suffering forfeiture of his property. This is a "compelling" which is prohibited by the Fifth Amendment. The early case of

Boyd v. *United States*, 116 U.S. 616 (1886), is in point.

Boyd was a civil action to seize goods allegedly imported without the payment of customs duties. The Government attempted to subpoena invoices which were in the possession of the defendants. The Supreme Court, regarding the action as having a "quasi-criminal" nature, denied the Government's right to subpoena the invoices, holding that,

> "[A] compulsory production of the private books and papers of the owners of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." 116 U.S. at 634, 635

The same principle was involved in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). There, certain policemen had been convicted of a conspiracy to obstruct the administration of the New Jersey traffic laws. The policemen appealed on the ground that statements obtained in violation of their privilege against self-incrimination were used as evidence to convict them. The incriminatory statements were obtained during an investigation by the New Jersey Attorney General into the fixing of traffic tickets. The policemen were questioned during this investigation, after being informed of their privilege against self-incrimination but were warned that if they refused to answer they could be removed from their jobs.

They answered the questions, and their answers were later used to convict them. The Supreme Court reversed the convictions and held that the use of the

statements violated the petitioners' privilege against self-incrimination. The Court said:

> "The choice given the petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona*, 384 U.S. 436, 464-465, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." 385 U.S. at 497, 498.

The Supreme Court has consistently held that a penalty may not be placed upon one for exercising his privilege against self-incrimination. *Spevack* v. *Klein*, 385 U.S. 511 (1967), and *Slochower* v. *Board of Education*, 350 U.S. 551 (1956). Also see *United States* v. *Parrott*, 248 F.Supp. 196 (D D.C. 1965); *United States* v. *Thayer*, 214 F.Supp. 929 (DC Colo. 1963); *Lord* v. *Kelley*, 223 F.Supp. 684 (DC Mass. 1963); *United States* v. *Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955); and *United States* v. *Guerrina*, 112 F.Supp. 126 (E.D.Pa. 1953).

At the hearing held by Judge Freeman on the motion to quash the indictment and to suppress evidence obtained through the interrogatories, evidence was heard on the issue of the Government's good faith in bringing the civil action. Judge Freeman concluded that the civil action was brought in good faith and was not a subterfuge to obtain evidence for a criminal prosecution. He held therefore that the evi-

dence was not tainted, relying on *Abel* v. *United States*, 362 U.S. 217 (1960).

Abel is not controlling here. That case involved a search and seizure issue; compulsory self-incrimination was not involved. The civil and criminal charges in *Abel* were only remotely related and it was by chance that evidence helpful in a criminal prosecution was obtained in the search. Moreover, the limits of the search were much more restricted than is the scope of permissible inquiry in civil interrogatories. In *Abel* it was conceded that the questioned evidence was obtained during a legal search of the defendant's hotel room after he was arrested on a deportation charge. It was claimed by the defendant that the Government was primarily interested in prosecuting him for espionage and that the search of his room was a ruse by Government agents to obtain evidence in the espionage case. The good faith of the Government agents was the issue in question. The question here is whether defendants were coerced to testify against themselves. If they were coerced within the meaning of the Fifth Amendment, the violation cannot be condemned merely because the Government agents acted in good faith. It is little comfort to the aggrieved party that those who deprive him of a constitutional right are men of good intentions.

The Government contends that the Fourth and Fifth Amendments do not prohibit the use of subpoenaed corporate books and records in a criminal prosecution against the corporation and its officers, citing *Essgee Co.* v. *United States*, 262 U.S. 151 (1923), and *Wilson* v. *United States*, 221 U.S. 361 (1911). These and other subsequent cases do so hold, but these interrogatories went far beyond a subpoena for corporate books and records. Kordel was president of the company and Feldten was vice presi-

dent. Feldten signed the answers to the interrogatories in his capacity as vice president but Kordel, as president, was under the same compulsion as Feldten to furnish the answers. Although the privilege against self-incrimination is personal, *White* v. *United States*, 322 U.S. 694 (1944), the interrogatories were for the most part requests for admissions by and information about the individual defendants, Kordel and Feldten. Many of the interrogatories required answers revealing Kordel's activities, speeches, and representations then under scrutiny in the contemplated criminal action. An officer in a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position.

In *Wilson*, which is a forerunner of those cases holding that corporation officers may not invoke their Fifth Amendment rights to prevent the production of corporate records, Mr. Justice Hughes drew the distinction in these words:

> "They have declined to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers." 221 U.S. at 385.

It is said in the Government's brief that all of the evidence used in the criminal case was obtained by independent investigation and that evidence obtained through the interrogation was not used in the criminal action. We find no tangible support in the record for this statement. It is submitted by Mr. Fowler, the Government agent on whose testimony the indictment was returned as he was the only witness who

appeared before the grand jury, that he used the answers to the interrogatories in preparing his testimony before the grand jury. There is no showing by the Government that any attempt was made at any stage of the proceedings to separate the two cases. There is no testimony or avowel by those who investigated and prosecuted the criminal case that they failed to use evidence and leads obtained through answers to the interrogatories. It is admitted by Government witnesses that in the enforcement of the Federal Food, Drug and Cosmetic Act it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings. Information obtained from whatever source is placed in one general file. We note, too, that the interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case. Some of the interrogatories were directed specifically toward the activities of Leland Kordel, president of Detroit Vital Foods, Inc., and the principal defendant in this case. We conclude from this record that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case.

It is pointed out by the Government that the Fifth Amendment privilege against self-incrimination is available only to natural persons and not to a corporation. We agree that this defense is not available to the corporate defendant, Detroit Vital Foods, Inc. *Campbell Printing Co.* v. *Reid*, 392 U.S. 286 (1968).

It is also argued by the Government that the Fifth Amendment privilege is not available to the individual defendant Kordel because he made no claim to the seized property and supplied no answers to the interrogatories. With this argument we do not agree. It is clear from the record that Detroit Vital Foods,

Inc., was merely the corporate device through which Kordel sold his products. The Government naturally wanted to cut through the facade and get to Kordel who was the president and dominant personality in the corporation. Although the extent of Kordel's ownership in the corporation is not disclosed by the testimony before us, he evidently was a major stockholder. He therefore had a financial interest in the seized property and certainly, as president of the company, he participated in the decision to answer the interrogatories. Aside from this, if it should be conceded that Kordel was under no coercion to answer the interrogatories, we are of the opinion that Feldten's admissions were not admissible against him under the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968). We conclude therefore that evidence and leads obtained by reason of the interrogatories should have been suppressed against the individual defendants in the criminal case.

We do not hold that a government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. We hold merely that the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property.

The judgment is reversed as to the individual defendants, Kordel and Feldten, and the case is remanded for proceedings consistent with this opinion. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17639

Filed, Feb. 20, 1969, Carl W. Reuss, Clerk

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DETROIT VITAL FOODS, INC., LELORD KORDEL, AND ALFRED FELDTEN, DEFENDANTS-APPELLANTS

ORDER

Before: O'SULLIVAN and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

The Government's petition for rehearing is granted. The opinion heretofore filed, on July 26, 1968, is modified on its face. The judgment is affirmed as to the corporate defendant, Detroit Vital Foods, Inc., and reversed as to the individual defendants, Lelord Kordel and Alfred Feldten.

Entered by order of the Court:

/s/ Carl W. Reuss
Clerk

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